IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. _____

LOUIS T. SPEARS, *et ux.*,

Petitioners

v.

THOMAS J. ASHE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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The petitioners, Louis T. Spears and Marie A. Dotson (formerly Mrs. Marie Spears), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland entered in this proceeding on December 9, 1971.

OPINION BELOW

The opinion of the Court of Appeals, reported at 263 Md. 622, 284 A.2d 207 (1971), appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on December 9, 1971. A timely motion for reargument was denied on January 10, 1972 and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether the failure to provide the petitioners with notice of the tax foreclosure proceedings against them deprived them of valuable property without due process of law.

2. Whether the Court of Appeals reversal of the trial judge's factual finding of no service without finding the trial judge clearly erroneous, without the benefit of the witnesses' demeanor, without reviewing the entire record, by distorting facts in record and relying on facts not in the record was arbitrary and denied the petitioners due process of law.

3. Whether the Court of Appeals has denied the petitioners equal protection of the law by establishing a rising burden of proof to impeach the official return of process and thus precluding jurisdictional challenges to tax foreclosure proceedings.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be . . . deprived of . . . property, without due process of law.

United States Constitution, Amendment XIV:

> "Nor shall any state deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The petitioners held unencumbered fee simple title to a .827 acre tract of land on the edge of a commercial district in Marlow Heights, Maryland. In 1967 the property was sold for a $261.28 property tax default to the respondent, Thomas J. Ashe, for $1,500.00 at a county tax sale. The proffered value of the property was $30,000.00 under residential zoning and $150,000.00 as commercial property. For the purposes of this petition the only question in dispute was whether the Spears had been summonsed to appear in a subsequent proceeding to foreclose their right of redemption in the property. The only proof of service was the official Sheriff's return signed by a county deputy sheriff indicating he perfected service on a couple who claimed to be the Spears at the Sheriff's substation in Hyattsville, Maryland on December 21, 1967. At trial on the merits the deputy sheriff identified his signature but could not recall the act of service and could not identify the Spears, having been given an opportunity to do so in September 1969. The Sheriff pointedly testified that no identification checks were made on self-proclaimed volunteers for service. At trial both Mr. and Mrs. Spears emphatically denied receiving service and testified that they were separated at the time. Both Mrs. Spears and her daughter testified she was living at a different address in a different town than as appeared on the summonses. She also testified she was at work on the day in question. Mr. Spears testified that he was living in Waterford Park, West Virginia, some 300 miles away, racing horses during the entire month of December and that he was there on December 21, 1967. He introduced photographs and the race track's account books to demonstrate his presence on every day of December with the exception of December 16th through the 26th, when there was a break in racing. He introduced the testimony in deposition of a groom, Kenneth Clinton, who occasionally assisted him, and a horse trainer, Robert Arnette, who stabled his horses next to him at the

track. Both of these individuals testified under penetrating cross-examination that Mr. Spears and his horses were present in Waterford Park for the entire month and specifically on December 21. They both pointed out that a small owner without an assistant had to personally tend to his race horses daily and that Mr. Spears was attentive to his duties. There was absolutely no refutation of these facts. They were accepted by the trial judge who specifically found that the Spears were not served with process on the day in question.

The respondent, Thomas Ashe, attempted to show he had contacted the Spears in the summer of 1967 regarding possible future foreclosure proceedings. Each contact was flatly denied under circumstances tending to show mistake or falsehood. Ashe attempted to introduce testimony by one of the associates in his attorney's firm regarding a phone call from Mrs. Spears. This conversation was specifically excluded as hearsay. (E. 78)

On direct appeal to the Maryland Court of Appeals, that court summarily denied petitioners' motion to dismiss the appeal on the grounds that it had been settled by agreement of counsel and it reversed the trial judge's finding of fact on the question of actual service. The gist of the Court of Appeals opinion was that the Spears had failed to meet the heavy burden of proof imposed upon the person denying service. The court asserted that the case adduced by the Spears was "too inconclusive" and that the corroborative testimony of Clinton and Arnette could not "explicitly and convincingly put Mr. Spears at Waterford Park on 21 December [1967]." (App. 7a) The Court claimed the sheriff's testimony supported the return on service and that Mr. Ashe's purported phone calls as well as his attorney's phone call to Mrs. Spears constituted refutation of her denial of service.

The Court did not discuss Mrs. Spears unrefuted presence at work or the complete lack of safeguards surrounding the curious circumstances of service in this case.

HOW FEDERAL QUESTION IS PRESENTED

This case involves the litigation of one constitutional and jurisdictional question, namely the receipt of actual service of process by the Spears. In the Spears' initial petition to set aside the decree filed September 17, 1969 it was alleged "that as a result of the foreclosure of the right of redemption without proper notice to your defendants [the Spears], the defendants have been divested of a valuable piece of property without due process of law" (E. 2). All the evidence introduced by the petitioners was designed to demonstrate lack of service and jurisdiction. With the Spears success on the presentation of the factual issues in the case it would have been presumptive and redundant on the part of the petitioners to belabor the obvious constitutional and jurisdictional ramifications of the factual issue before the Court of Appeals, namely, the receipt of actual service of process. With the unexpected decision of the Court of Appeals the petitioners strongly protested the court's misapplication of its own standards of appellate review and its arbitrary denial of due process and equal protection of the laws. (Motion for Reargument, page 8). This petition was summarily denied without reference to the federal question. The petitioners assert that this course of conduct by the Maryland Court of Appeals has taken them by surprise. *Cole v. Arkansas*, 333 U.S. 196, 200 (1948) and cases collected in Stern and Gressman, *Supreme Court Practice*, 125 n. 28 (4th Ed. 1969).

REASONS FOR GRANTING THE WRIT

1. The failure to provide the petitioners with notice of the tax foreclosure proceedings against them has deprived them of valuable property without due process of law.

The principle that defendants in a tax foreclosure proceeding must be given constitutionally requisite notice has been established beyond cavil. *Nelson v. New York*, 352 U.S. 103 (1956); see generally, *Mullane v. Central Hanover*

Bank and Trust Company, 339 U.S. 306 (1950). Under a claim of this constitutionally protected right the petitioners seek an "independent examination of the whole record" in this court to adequately secure that right. *Bachellar v. Maryland*, 397 U.S. 564 (1970), *Greenbelt Coop. Pub. Asso. v. Bresler*, 398 U.S. 6 (1970). The extent of this power of review is not limited to violations of personal rights as opposed to property rights. *Lynch v. Household Finance Corporation*, ___ U.S. ___, 40 L.W. 4335 (1972).

2. The Court of Appeals' reversal of the trial judge's factual finding of no service without finding the trial judge clearly erroneous, without the benefit of the witnesses' demeanor, without a review of the entire record, by distorting facts in the record and relying on facts not in the record was arbitrary and denied petitioners due process of law.

The Maryland Court of Appeals has repeatedly reiterated the heavy burden of proof which faces the litigant who attempts to impeach the official return of process. The Court of Appeals' statement in its opinion (App. 7a) that this "Burden of Proof is on the person denying that he was served, and this burden can only be discharged by adducing conclusive and unrefuted testimony or circumstances, *Weisman v. Davitz*, supra 174 Md. at 451 which must be, in the language of *Sarlouis v. Firemen's Insurance Co.*, supra, 45 Md. at 245, 'clear and convincing.'" only echoes similar statements in cases such as *Kaylor v. Wilson*, 260 Md. 707, 273 A.2d 185 (1971), *Weinreich v. Walker*, 236 Md. 290, 203 A.2d 854 (1964) and *Surasky v. Surasky*, 11 Md. App. 143, 273 A.2d 210 (1971). Faced with this burden of proof, the Spears presented all the facts available to them after a full investigation to the trial judge who observed the witnesses, judged their credibility and demeanor and chose to accept Louis Spears' and his wife's denial of service as true and as corroborated by all of the evidence. (E. 4-5) The Court of Appeals was obliged to review the same facts that were presented to the trial judge pursuant to Maryland Rule 886 which provides:

> "The judgment of a lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses."

Nowhere did the Court of Appeals attempt to determine that the trial judge was clearly erroneous and no regard whatsoever was given to his ability to judge the credibility of witnesses.

In its recitation of the facts the Court of Appeals quite clearly expressed doubts as to the Spears' credibility in claiming they first became aware of the tax sale in August, 1969. (App. 2a) Yet nowhere in the opinion does the Court allow for the fact that the trial judge obviously believed them. The Court also relied on Ashe's testimony to refute Mrs. Spears when it is obvious from the record that these were contested assertions and the trial judge did not accept Ashe's testimony or deemed it irrelevant. (App. 7a) The Court of Appeals also determined that neither Clinton's nor Arnette's testimony could "convincingly" place Mr. Spears at the racetrack on the day in question. (App. 7a) These are all judgments on the witnesses' credibility and constitute an unwarranted usurpation of the trial judge's function as established by common law and the Court's own rules of procedure. *Creamer v. Bivert*, 214 Mo. 473, 113 S.W. 1118 (1908); Anno.: Witnesses — Impressions Produced in Testifying, 111 ALR 742 (1937); Md. Rule 886; Indeed no one has made this more clear than the Maryland Court of Appeals in nothing less than a tax foreclosure case where it was said on almost identical facts:

> "The judge presiding there had the advantage of hearing and observing the witnesses, and was therefore in a more favorable position than our own to determine as to the force and weight of their testimony. It is apparent from the record that the deputy sheriff who made the return was not positive as to the identity of the person upon whom the process against the appellee was actually served . . . . The denial of the appellee is sup-

> ported by proof, already summarized, which appears to be worthy of credence." Piedmont-Mt. Airy Guano v. Merritt, 154 Md. 226, 140 A.62 (1928).

This is the proper standard of appellate review; to apply a different and unspoken standard or to apply no standard at all in regard to the credibility of witnesses is an arbitrary denial of due process. See, *Federal Rules of Civil Procedure*, Rule 52(a) and *Zenith Radio Corporation v. Hazeltine Research*, 395 U.S. 100, 123 (1969).

The Court of Appeals was also arbitrary in failing to review the entire record. While the Court recited a substantial outline of the evidence in the first half of its opinion, it did not evaluate all of that evidence or other evidence in the record in reaching its conclusions. Aside from the corroborative testimony, the Court gave no credence whatsoever to the very "circumstances" which it claims are an important aspect of the judicial inquiry into service. (App. 6a) The improper address on the summonses, the lack of an identification check on the couple who volunteered for service, the fact that Mr. and Mrs. Spears were separated, and the gross unlikelihood of Mr. Spears driving over 300 miles to meet with his wife, accept service, and then ignore the sale of the property and the funds on deposit in Court for two years were important factors which led to the trial judge's conclusions in this case. These were ignored by the Court of Appeals. The Court is not simply guilty of oversight in this regard, for in reviewing the corroborative testimony it openly contradicted itself. The Court stated that it was "assuming the truth of every word that Clinton and Arnette said" (App. 7a) but it then asserts that they could not "explicitly and convincingly put Spears at Waterford Park on 21 December." The Court seized on one quote from one of these witnesses as a basis for this assertion (App. 4a-5a). It completely ignored the testimony from those witnesses which explicitly placed Mr. Spears in Waterford Park on every day of December of 1967, including December 21st. (E. 9, E. 15 and E. 20). A minimal requirement of due process on appeal

must include a detailed appraisal of all of the evidence. See, *Gruenthal v. Long Island R. Co.*, 393 U.S. 156, 159 (1968). Indeed, Judge Barnes of the Maryland Court has scolded his brethren for selective fact review in other cases. *McDonald v. Board of County Comm'rs*, 238 Md. 549, 560, 210 A.2d 325 (1965) (Dissenting opinion). In this case the Court of Appeals has over-focused on two bits of evidence to the exclusion of everything else, when the standard of review should have been clear and convincing evidence on the record as whole. This would include the corroborative evidence, the Sheriff's lack of support for his own service, the circumstances of service, and all that mass of detail which, synthesized as whole, clearly convinced the trial court that the Spears had not been served.

In addition to picking and choosing those facts which support its conclusion in the case, the Court of Appeals violated all ground rules of appellate review by distorting facts in the record and relying on facts not in the record. One of the logical obstacles to the Court of Appeals' decision was the Sheriff's inability to support his own return of process. This problem was neatly resolved in Ashe's favor by the following statement from the Court's opinion (App. 7a):

> "The Sheriff gave no testimony which would explicitly support the denial of service; on the contrary, he testified that a couple who identified themselves as Mr. and Mrs. Spears came to his office at Hyattsville and were served by him and that his signature on the return shows that this is what happened."

A review of the record clearly indicates that the sheriff was not able to identify the Spears at the time of service or at a later time and that he specificially was unable to support his own return of service other than to identify his signature. (E. 37) But there is no need to refer to the record extract to check this assertion for in the Court's own opinion (App. 3a) Judge Singley observed:

> He [the Sheriff] was asked for an explanation of the return which he had endorsed on the second subpoena:
>
> "(The [Trial] Court): And when you say personal delivery of and leaving a copy of the subpoena, bill of complaint with Louis T. Spears and Marie A. Spears, what do you mean by that?
>
> "(The witness): This would mean to me that someone who identified themselves to me as Mr. and Mrs. Spears they came to me and identified themselves as this person and I personally served them with the copies of the bill of complaint and subpoena."

To convert "someone who identified themselves to me as Mr. and Mrs. Spears" into a positive identification of the Spears is nothing less than a misreading of this testimony.

As the Court of Appeals noted in its opinion, "if the defendants' denial of service is supported by corroborative evidence by independent, disinterested witnesses, the denial will stand unless the corroborative evidence is refuted." (App. 7a) Since Ashe never attempted to refute the Spears' corroborated absence from Hyattsville on the day of service, the Court had to remedy this deficiency. It made one mistake, however, for it found the

> "Refutation of Mrs. Spears' denial . . . in Ashe's testimony that he had called Mrs. Spears' place of employment on three occasions, had asked for Mrs. Spears, and had talked to a woman who said she was Mrs. Spears, and in the testimony of Ashe's lawyer who said that he had received a call from a person who identified herself as Mrs. Spears."

If believed, this testimony refutes nothing for it plainly appears in the record that these calls all took place in the summer and fall of 1967, at least two months before the alleged date of service. (E. 68, 69, 78) Moreover, the call to Ashe's attorney was specifically excluded as hearsay. (E. 78) In point of fact all of Ashe's testimony was

put under a cloud of doubt by cross-examination and the trial judge apparently gave no weight to it. Not only has the Court of Appeals turned dubious irrelevancies into proof positive but it has converted specifically excluded evidence into a decisional point in the case.

This Court has made it clear that it has no desire to become involved in the factual entanglement of state trial and appellate court decisions. The rule that concurrent findings of fact by two courts will usually preclude factual review in this Court has been most eloquently stated by Mr. Justice Frankfurter in *Baumgartner v. United States*, 322 U.S. 665, 670 (1948). But even in that case review was allowed. Here there are no concurrent findings but, on the contrary, an abbreviated reversal of the trial judge's "ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print." Id.

The question arising out of the mass of detail here involves the taking of valuable property without notice to the owners. The Court of Appeals obviously disagreed with the "ultimate fact" found by the trial judge. To permit that court to disregard the multitude of facts on which his conclusion was based, to let an appellate record suffice for live testimony fairly presented to the judicial officer charged with the duty of weighing all of the conflicting evidence and judging credibility would be an invitation to appellate anarchy. The issue before this court is not simply one of fact, but of determining the minimal constitutional standards by which an appellate court can review facts. If such a standard exists, it has manifestly not been followed in this case.

3. The Court of Appeals has denied the petitioners equal protection of the law by establishing a rising burden of proof to impeach the official return of process and thus precluding jurisdictional challenges to tax foreclosure proceedings.

The Court of Appeals has unquestionably set a high standard of proof to upset the official return of process in a tax foreclosure proceeding. It is impermissible, however, for the Court to utilize discriminatory reviewing procedures to assure that the standard cannot be met. By requiring the Spears to prove their case, not by clear and convincing evidence on the record as a whole, but by clear and convincing corroborative evidence unaided by other supportive evidence, whether or not the trial judge found it clear and convincing, is to set an impossible standard that has not been imposed in general run of cases. Judge Barnes' criticism of the Court in zoning cases in *McDonald v. Board of County Comm'rs,* supra, 238 Md. at 560, has apparently had some effect in assuring a full and systematic review of the entire record with proper deference to the fact finding officials. See, e.g., *Cabin John Limited v. Montgomery County*, 259 Md. 661, 673, 271 A.2d 174 (1970), but see *Chapman v. Montgomery County*, 259 Md. 641, 650, 271 A.2d 176 (1970) (Barnes J., Dissenting at omissions from the review of the evidence). Where the Court has taken an active role in enunciating social policy objectives it has quite bluntly utilized its fact reviewing power to obtain these objectives. Zoning is one area of Maryland law where this is true. Protection of the State's Unsatisfied Claim and Judgment Fund is another area, where under the guise of protecting the fund from suspicious "hit and run" motor vehicle claims, the court has placed impossible and shifting factual burdens of proof upon litigants. Indeed, the court was chided for subjecting claimants to the "labors of Sisyphus" with its constantly rising standard of

proof. *Jones v. Unsatisfied Claim and Judgment Fund*, 261 Md. 62, 71, 273 A.2d 418, 423 (1971).[1]

A similar failing applies to tax foreclosure challenges, the apparent result of the Court's desire to stabilize the title to land purchased at tax sales. This objective may be noble but it cannot be used as an excuse to reverse a trial judge's findings of facts based on credibility and the weighing of the evidence as a whole. This is not only a usurpation of his function but an outright denial of the same appellate review accorded other litigants. As such the Maryland Court of Appeals has denied the petitioners equal protection of the laws.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Maryland Court of Appeals.

Respectfully submitted,

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[1] Sysyphus was the King of Corinth condemned in Hades to perpetually roll a huge rock uphill – and to have it forever roll back again as he neared the top. Hamilton, Mythology, p. 298 (Mentor 1942).

v.

Louis T. SPEARS, et ux.

No. 108.

Court of Appeals of Maryland.

Dec. 9, 1971.

Proceeding on appeal by purchaser at tax sale from a supplemental decree entered in the Circuit Court, Prince George's County, Samuel J. DeBlasis, J., vacating earlier decree vesting title in purchaser, and voiding county treasurer's tax sale deed upon payment of costs of redemption by former owner and his wife. The Court of Appeals, Singley, J., held that evidence adduced by former owners was insufficient to successfully impeach validity of service of process upon them.

Reversed.

Carlyle J. Lancaster, Hyattsville (Richard B. Bland and Lancaster, Bland, Eisele & Herring, Hyattsville, on the brief), for appellant.

James Ignatius Keane, College Park (DePaul & Willoner and Ronald Willoner, College Park, on the brief), for appellees.

Argued before HAMMOND, C.J., and BARNES, McWILLIAMS, SINGLEY, SMITH and DIGGES, JJ.

SINGLEY, Judge.

In March of 1966, the appellant Ashe purchased for $1,500 at a tax sale less than an acre of land located near a

shopping center at Marlow Heights in Prince George's County. The property, owned by Louis T. Spears and his then wife, Marie A. Spears (now Marie A. Dodson), had been sold for non-payment of taxes in the amount of $261.28. In November 1967, Ashe instituted a proceeding in the Circuit Court for Prince George's County to foreclose Mr. and Mrs. Spears' right of redemption. This was brought to a conclusion in April of 1968 by a decree vesting title in Ashe.

In August of 1969, Spears and his wife learned—they said for the first time—of the tax sale when a request was made of their real estate agent to remove a "For Sale" sign from tthe property. In September they started proceedings to vacate the 1968 decree. From a supplemental decree vacating the earlier one, and voiding the county treasurer's tax sale deed upon payment of costs of redemption by Spears and his former wife, Ashe has appealed.

The core of the problem is whether Mr. and Mrs. Spears may successfully impeach the validity of service of process upon them. If they can, the decree of the lower court must be affirmed, and they will be able to redeem the property. If they cannot, the decree must be reversed, and title will remain vested in Ashe.

Until early February, 1967, Mr. and Mrs. Spears lived at 9508 Ardmore Road, Route 1, Landover, Maryland. At that time, because of domestic difficulties, Mr. Spears, who trains and raced horses, moved to Charles Town, West Virginia, and said that in November and December of 1967, he was at a track at Waterford Park, near Chester, West Virginia. Mrs. Spears stayed on in the house until 3 November 1967, when she moved to an apartment at Glendale, Maryland, but her son, Ralph T. Spears, continued to occupy the Ardmore Road house until about June of 1968.

On 6 November 1967, Ashe filed his action to foreclose Mr. and Mrs. Spears' right of redemption in the property which he had purchased at the tax sale. On the same day, a

subpoena was issued, directed to Mr. and Mrs. Spears at "Route 1, Ardmore Road, Landover, Md." and delivered to the sheriff for service. On 7 December, the subpoena was returned with the notation "non est Louis and Marie Spears unable to locate."

On 11 December 1967, the subpoena was reissued and was returned on 22 December with the notation:

> "Summoned Louis T. Spears and Marie A. Spears by personal delivery of and leaving a copy of subpoena and Bill of Complaint with said Louis T. Spears and Marie A. Spears at Hyattsville, Md. on this 21 day of December, 1967."

On 28 December, the court passed an order of publication, which was published in a local newspaper for four successive weeks, commencing 4 January 1968.

Forrest A. McDaniel, Deputy Sheriff of Prince George's County, called as a witness by Mr. and Mrs. Spears, testified that in December 1967, he was assigned to the County Service Building in Hyattsville. He said, after examining the first subpoena dated 6 November, which was directed to "Louis T. Spears and Marie A. Spears, his wife, Route 1, Ardmore Road, Landover, Md.," "From Looking at the address, it would have been more or less common procedure to non-est a paper issued with the address that was insufficient like this."

After being shown the subpoena which was reissued on 11 December, Sheriff McDaniel admitted that he had been unable to recognize Mr. Spears and had no recollection of having served the subpoena on 21 December. He explained that he was serving, at that time, between 50 and 60 papers a month, all to people who came to his office. He was asked for an explanation of the return which he had endorsed on the second subpoena:

> "(The Court): And when you say 'Personal delivery of and leaving a copy of the subpoena, bill of complaint with Louis T. Spears and Marie A. Spears,' what do you mean by that?

"(The witness): This would mean to me that someone who identified themselves to me as Mr. and Mrs. Spears, they came to me and identified themselves as this person and I personally served them with the copies of the bill of complaint and subpoena."

Spears testified that he had lived at Ardmore Road for 15 years prior to leaving in 1967; that on 21 December 1967, he was at Waterford Park, where no attempt was made to serve him. Three photographs were offered in evidence showing Spears at Waterford Park on 29 November, 15 December, and 29 December, as well as a statement of account, issued by the race track, which showed that Spears had raced his horses with considerable regularity from 29 November to 16 December and from 26 December until the end of the month. Spears explained the inactivity which began 17 December and continued through 25 December by saying that the track had been closed for a week or more at Christmas. Spears was quite positive that he stayed at Waterford Park during this period, taking care of his horses.

Also admitted in evidence were the depositions of Robert F. Arnette, a trainer who had stabled his horses next to Spears' during the 1967 fall meet at Waterford Park, and Kenneth A. Clinton, a groom who had worked there for Arnette, and occasionally, for Spears. The thrust of their testimony was that Spears, who raced only three or four horses, simply had to be at the track every day to water, feed and exercise his horses, because the economics of the situation made the employment of other help unfeasible. It was only by this reasoning that they were able to put Spears at the track all through December, since neither could say he was there on 21 December.

In the course of his deposition, Arnette put it this way:

"Q And you say him every day in the month of December?

"A I could reasonably say yes because I can't remember no day that he wasn't there.

"Q And you would have noticed that?

"A Man, anybody would, because when a horse's water bucket gets empty they will rattle it, and it's most aggravating. And your neighbors talk about you maliciously if you neglect your horses, is what I mean."

Mrs. Dodson, formerly Mrs. Spears, testified that on 21 December 1967, she was at her place of employment in Cheverly, Maryland; that she was not served with process, and did not go to the County Service Building in Hyattsville to receive any papers.

Ralph T. Spears, Mr. Spears' son, who continued to live at the Ardmore Road house after his father and mother left, testified that he did not see his father at any time during the month of December 1967, and that no papers had been served at the house.

Ashe, the tax sale purchaser, testified that he had talked to Mr. Spears at Ardmore Road in the summer of 1967, and later had made a telephone call to Mrs. Spears at the place where she was employed. He said that he had told both of them that he had bought the property at a tax sale and had asked whether they intended to redeem it. Each answered his question affirmatively, saying that they had been through such a situation before with the same property. Ashe said he called Mrs. Spears again on two other occasions, and each time she assured him that the property would be redeemed. Spears said that he was in Vermont when Ashe was supposed to have spoken to him at Ardmore Road. Mrs. Spears denied having received any telephone calls from Ashe, or having called his lawyer about the redemption.

This case does not, as did the recent cases of Walter E. Heller & Co. v. Kocher, 262 Md. 471, 278 A.2d 301 (1971) and Jannenga v. Johnson, 243 Md. 1, 220 A.2d 89

(1966) turn on the question whether a plaintiff in a redemption foreclosure case has made a good faith effort to put the former owner on notice of the proceeding pending against the property. It involves the more difficult question whether the official return of service of process may be impeached.

[1, 2] The rule of our cases is that the return of service of process is presumed to be true and accurate and a mere denial by a defendant, unsupported by corroborative evidence or circumstances, is not enough to impeach the return of the official process server, McGinnis v. Rogers, 262 Md. 710, 737, 279 A.2d 459 (1971); Kaylor v. Wilson, 260 Md. 707, 713, 273 A.2d 185 (1971); Weinreich Admx. v. Walker, 236 Md. 290, 296, 203 A.2d 854 (1964); Little v. Mifler, 220 Md. 309, 315-316, 153 A.2d 271 (1959); Parker v. Berryman, 174 Md. 356, 359, 198 A. 708 (1938); Weisman v. Davitz, 174 Md. 447, 451, 199 A. 476 (1938); Windwart v. Allen, 13 Md. 196, 200 (1859). This is because the affirmative testimony of the official process server acting in the regular routine of duty without a motive to misrepresent must be preferred to the negative evidence of one claiming not to have been served, either for reasons of public policy or as a matter of probability, Sarlouis v. Firemen's Insurance Co., 45 Md. 241, 244 (1876).

[3] The rule has a corollary, however: if the defendant's denial is supported by corroborative evidence by independent, disinterested witnesses, the denial will stand unless the corroborative evidence is refuted. Thus, there was a successful challenge of service in Harvey v. Slacum, 181 Md. 206, 29 A.2d 276 (1942), where a husband and wife denied they had been summoned, and the sheriff did not know whether he had served the husband or the husband's son, could not identify the husband in the courtroom and could not remember the wife or say that he had summoned her. The same result was reached in Plummer v. Rosenthal, 178 Md. 149, 12 A.2d 530 (1940) where Rosenthal denied service and the sheriff was uncertain whether he had served

Rosenthal or Rosenthal's brother. Return of service was similarly impeached in Piedmont-Mt. Airy Guano Co. v. Merrit, 154 Md. 226, 140 A. 62 (1928) where the defendant's father denied service and there was corroborating testimony that the father was not at his son's home at the time service was supposed to have been made, and the sheriff was highly uncertain in making identification.

[4] But the burden of proof is on the person denying that he was served, and this burden can only be discharged by adducing conclusive and unrefuted testimony or circumstances, Weisman v. Davitz, *supra*, 174 Md. at 451, 199 A. 476, which must be, in the language of Sarlouis v. Firemen's Insurance Co., *supra*, 45 Md. at 245, "clear and convincing." It is apparent to us that the testimony on which Spears relies is too inconclusive to meet this test.

Assuming the truth of every word that Clinton and Arnette said, they could not explicitly and convincingly put Spears at Waterford Park on 21 December. They both relied on a course of conduct, yet neither was able to remember who was on the other side of their stall; and both admitted that if there were no racing, Spears' horses could be left in another's care for a day or two.

Ralph Spears' failure to see his father during December is not conclusive proof that his father was or was not in Prince George's County or Waterford Park.

The sheriff gave no testimony which would explicitly support the denial of service; on the contrary, he testified that a couple who identified themselves as Mr. and Mrs. Spears came to his office in Hyattsville and were served by him, and that his signature on the return showed that this is what happened.

Refutation of Mrs. Spears' denial is found in Ashe's testimony that he had called Mrs. Spears' place of employment on three occasions, had asked for Mrs. Spears, and had talked to a woman who said she was Mrs. Spears, and in the testimony of Ashe's lawyer who said that he had

reeived a call from a person who identified herself as Mrs. Spears.

[5] Under our view of the case, Mr. and Mrs. Spears simply did not meet the burden of proof required if service of process were to be impeached. Having reached this conclusion, we need not consider whether there was valid service by publication, as Ashe contended.

Decree reversed, costs to be paid by appellees.